

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILLIAM DAVID MARTIN,)
Plaintiff,) Case No. C05-1330-JCC-JPD
v.)
JO ANNE B. BARNHART, Commissioner) REPORT AND RECOMMENDATION
of Social Security Administration,)
Defendant.)

I. INTRODUCTION AND SUMMARY CONCLUSION

18 Plaintiff William David Martin is proceeding pro se and in forma pauperis (“IFP”) in
19 this civil action against the Commissioner of the Social Security Administration
20 (“Commissioner”). Plaintiff alleges that an administrative law judge (“ALJ”) erroneously
21 denied his applications for Disability Insurance Benefits (“DIB”) and Supplemental Security
22 Income (“SSI”). Dkt. No. 3. Defendant has filed a motion to dismiss in lieu of an answer.
23 Dkt. No. 14. The Commissioner argues that plaintiff failed to timely file this civil action. *Id.*
24 Plaintiff has not filed a response to the motion. Having carefully reviewed defendant’s motion
25 and the balance of the record, the Court recommends that defendant’s motion to dismiss (Dkt.
26 No. 14), be GRANTED, because plaintiff failed to commence suit within sixty days of the

01 | Commissioner's final administrative decision.

II. FACTS AND PROCEDURAL HISTORY

03 The facts of this case are brief and undisputed. On March 22, 2001, plaintiff filed
04 applications for DIB and SSI. Dkt. No. 15, Ex. 1. After the applications were denied both
05 initially and upon reconsideration, an administrative hearing was held before an ALJ. *Id.* On
06 April 19, 2004, an ALJ issued a decision finding plaintiff not disabled. *Id.*

7 Plaintiff appealed the decision and on May 12, 2005, the Social Security
8 Administration's Appeals Council mailed a notice advising him that his request for
9 administrative review had been denied. Dkt. No. 15, Ex. 2. The letter stated that plaintiff had
10 sixty days from receipt of the notice to file a civil action challenging the ALJ's decision, and
11 that plaintiff was presumed to have received the letter five days after the date it was sent. *Id.*
12 Additionally, the letter advised plaintiff that he could file a request for an extension of time to
13 file a civil action. *Id.* Plaintiff filed no such request. Dkt. No. 15 at ¶ (3)(b).

14 On August 11, 2005, plaintiff filed an IFP application, together with his complaint.
15 Dkt. No. 1. The Court directed service of the complaint on defendant. Dkt. Nos. 7-10. On
16 March 29, 2006, defendant filed the present motion to dismiss in lieu of an answer. Dkt. No.
17 14. In this motion, defendant argues that plaintiff failed to timely commence his action within
18 sixty days of receipt of the Appeals Council's notice, and that plaintiff has not requested an
19 extension of time. *Id.* Plaintiff has not responded.

III. ANALYSIS

21 A plaintiff may not sue the United States unless Congress explicitly has waived
22 sovereign immunity and provided for a procedure and jurisdiction for doing so in a federal
23 district court. *Tucson Airport Authority v. General Dynamics Corp.*, 136 F.3d 641, 644 (9th
24 Cir. 1998) (citing *North Star Alaska v. United States*, 9 F.3d 1430, 1432 (9th Cir.1993) (en
25 banc)). Section 405(g) of Title 42 of the United States Code provides the time and manner for
26 which suits against the Commissioner for the denial of Social Security benefits may be brought.

01 It states:

02 Any individual, after any final decision of the Commissioner of Social Security
 03 made after a hearing to which he was a party, irrespective of the amount in
 04 controversy, may obtain a review of such decision by a civil action commenced
 05 within *sixty days* after the mailing to him of notice of such decision or within
 06 such further time as the Commissioner of Social Security may allow.

07 42 U.S.C. § 405(g) (2005) (emphasis added); *see also* 42 U.S.C. § 1383(c)(3) (indicating that
 08 § 405(g) applies to applications for SSI). The Social Security Regulations explain that a
 09 claimant may file such a suit “in a Federal district court within *sixty days* after the date [they]
 10 receive notice of the Appeals Council’s action.” 20 C.F.R. §§ 404.981, 416.1481 (2005)
 11 (emphasis added). A claimant is presumed to have received notice of the Appeals Council’s
 12 action five days after the date on the notice, unless plaintiff shows otherwise. 20 C.F.R. §§
 13 404.901, 416.1481, 422.201(c).

14 Ini this case, plaintiff did not file his suit within sixty days of receiving notice of the
 15 Appeals Council’s action. The Appeals Council’s notice was issued on May 12, 2005. Dkt.
 16 No. 15, Ex. 2. Plaintiff is presumed to have received it five days later, on or about May 17,
 17 2005. Plaintiff then had sixty days to commence suit. This period would have ended on or
 18 about July 17, 2005. Plaintiff, however, did not file his IFP and complaint until August 11,
 19 2005, almost a month after the deadline had passed. Even excluding weekends and giving
 20 plaintiff every benefit of the doubt, his complaint was not timely filed.

21 Plaintiff has failed to provide a justification for the late filing. Although plaintiff was
 22 advised by the Appeals Council of the above-described deadline and the fact that he could
 23 request an extension of time, no extension was requested. Dkt. No. 15 at ¶ (3)(b) and Ex. 2.
 24 Moreover, plaintiff failed to submit a response to the present motion to dismiss, which the
 25 Court construes as an indication that defendant’s motion has merit. *See* Local Rule 7(b)(2).
 26 Absent waiver by the Commissioner or any compelling equities presented by plaintiff, the
 27 Court cannot toll the statute of limitations. *Banta v. Sullivan*, 925 F.2d 343, 345-46 (9th Cir.
 28 1991). Accordingly, the Court must conclude that plaintiff failed to commence this suit in a

timely fashion, and that defendant's motion to dismiss should be granted.

IV. CONCLUSION

This Court recommends that defendant's motion to dismiss be granted because of plaintiff's failure to file suit within sixty days of the Appeals Council's denial of his request for review. A proposed Order accompanies this Report and Recommendation.

DATED this 16th day of May, 2006.

James P. Donohue
JAMES P. DONOHUE
United States Magistrate Judge